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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY, and
JESSE R. HUFF, members of the
CALIFORNIA STATE LANDS COMMISSION,
Appellants,

vs.

WESTERN OIL AND GAS ASSOCIATION, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

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Appellees Western Oil and Gas Association, et al., respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in this case on the grounds that (1) the decision of the Court of Appeals is plainly correct and (2) the questions presented by the appeal are insubstantial and do not warrant further argument. Sup. Ct. R. 16.

The Jurisdictional Statement of appellants sets forth the Court's jurisdiction and the Constitutional clauses and regulations involved in this appeal. These matters will not be repeated herein.

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly determine that State regulations, which provide for a throughput charge based on the volume of commodities crossing State-owned tidelands and submerged lands, which throughput charge is in addition to a fair rental based on appraised value ("throughput regulations"), constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause of the Constitution?

2. Did the Court of Appeals correctly determine that the throughput regulations constitute an impost or duty on imports of commodities passing over State lands in violation of the Import-Export Clause of the Constitution?

STATEMENT OF THE CASE

This case arises from the fact that in 1953, with the adoption of the Submerged Lands Act, Congress granted to each coastal state, including California, a band which extends the length of the State from the mean high tide line out three miles to sea. As a result, it is essentially impossible for commodities transported by sea to enter the State without crossing State-owned real estate.¹ Almost all oil entering the State by sea must use pipelines crossing State property.² That, in turn, requires a lease from the State.

Prior to 1976, the California State Lands Commission ("Commission") leased that property at a "fair market rental" value determined on the basis of an appraisal. From 1976 to the present date, the Commission has continued to appraise the land and to fix a fair market rental based on the appraisal. In 1976, however, it adopted regulations calling for the collection, in addition, of a "throughput" rental, i.e., a rental based on the amount of petroleum transmitted through pipelines over land the State owns. The total rental resulting is greatly in excess of the fair rental fixed by the State's own appraiser.³

¹While the State has granted limited narrow strips within the tidelands to its political instrumentalities, the cities and counties, the State still holds 99 percent of the California coastline and all of the shelf out to the three-mile limit. Thus, there is no way for commerce entering the State by sea to avoid State property or the property of State instrumentalities.

²Court of Appeals Opinion, Jurisdictional Statement p. A-5.

³District Court Opinion, Jurisdictional Statement p. A-19.

These regulations were challenged by a declaratory relief action filed in the United States District Court in 1976. The District Court held the throughput regulations invalid under the Commerce Clause, the Import-Export Clause, and the Duty of Tonnage provision of the Constitution in April 1982. The Court of Appeals affirmed the holding as to the Commerce Clause and the Import-Export Clause in January 1984. Copies of both opinions are annexed to the Jurisdictional Statement.

ARGUMENT

A. Summary of Argument

Although a state has general taxing power, it may not collect a tariff on imports and exports. Such a tariff is expressly forbidden by the Constitution. Similarly, such a charge would constitute an unconstitutional burden on interstate commerce and an unconstitutional duty on imports.

It is conceded that such charges are invalid under the State's general taxing power. The State, nevertheless, seeks to defend the charges in the present case as being based on the State's proprietary powers. But, since the State owns essentially all of the real estate along its borders out to the three-mile limit, these constitutional prohibitions would be meaningless if the State could use its "proprietary" powers to accomplish precisely the result which is forbidden to its taxing power under the Constitution. That is all that the Court of Appeals held. This is a proposition of sufficiently obvious correctness that it should hardly be necessary for this Court to deal with it.

B. The Basic Flaw in the State's Argument: It Simply Ignores the Problem

The basic flaw in the argument presented in the State's motion is a simple one. The State simply ignores the problem. We have pointed out throughout that, since the State has all the land out to the three-mile limit, it is in a position to exact the precise equivalent of a tariff by making a throughput charge for the use of that land, and we have urged that this is exactly what the State did. If the State's argument had validity, the charge in the present case would have been unconstitutional as applied to foreign commerce if it was called a "tariff," but would somehow miraculously become constitutional because it was called a rent. That, of course, is palpable nonsense. As the Court of Appeals noted, it is the practical effect and not the label that deter-

mines whether legislation or regulation passes Constitutional muster. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In this connection, the "user" fee cases on which the Court of Appeals relied are of direct pertinence.⁴ A user fee is permissible for an essential State facility in commerce to the extent that it reflects benefits conferred by the State or costs incurred by the State but becomes an unconstitutional burden on interstate commerce if it goes beyond that level. The problem addressed by the court in the user fee cases is that of distinguishing between a burdensome effort to use a strategic position to enlarge revenue at the expense of commerce as opposed to a reasonable charge for services or benefits. The analysis of those cases is, therefore, highly appropriate to a situation like the present, where the state owns the tidelands and all the subsea land out for three miles, surely an essential throat of commerce. Indeed, the State's criticism of the Court of Appeals' reliance on these decisions is flawed in the same way that the State's analysis is: it simply ignores the basic question, which is whether they can collect a charge in all respects the same as a tariff by calling it a rental.

C. The Import-Export Clause Prohibits the Imposition of a Throughput Charge

The Court of Appeals correctly held that the throughput regulations impose a tax forbidden by the Import-Export Clause of the Constitution. The Import-Export Clause, Article I, Section 10, Clause 2, of the Constitution, provides:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Ex-

⁴See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981); *Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. 274 (1977); *Nippert v. Richmond*, 327 U.S. 416 (1946); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

ports, except what may be absolutely necessary to executing its Inspection Laws . . .”

The Import-Export Clause has a three-part test. First, the charge may not usurp the federal government’s authority to regulate foreign relations by creating a special protective tariff which discriminates against imports. Second, the charge may not deprive the federal government of the right to all revenues from imposts and duties unless it is reasonably related to the value of services rendered by the State. Third, the charge must be reasonably related to services provided so as not to disturb harmony among the states. The test here is similar to the Commerce Clause inquiry. Simply, the Constitution allows the State to seek compensation for services and property it provides. Seaboard states are forbidden, however, from exploiting their position to the detriment of foreign commerce. These considerations are articulated in numerous Supreme Court cases, such as *Department of Revenue v. Ass’n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

The Court of Appeals correctly focused on whether there is a correlation between the throughput charge and benefits conferred by the State. It found:

“California is exploiting its favorable geographic situation to exact a transit fee from the goods in question. It is ‘levying . . . on citizens of other States by taxing goods merely flowing through their ports to the other states not situated as favorably geographically.’”

Court of Appeals’ Opinion, Jurisdictional Statement
pp. A-12, 13.

That holding is clearly the correct one.

D. The Throughput Regulations Are Invalid Under Familiar Commerce Clause Principles

The Court of Appeals also correctly held that the throughput regulations violate the Commerce Clause. The Commerce Clause states:

“The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...”

The application of the Commerce Clause today may be distilled into just a few words: Is the charge reasonably calculated to reimburse a state for the cost of providing services and benefits? If so, it is not an unconstitutional burden on interstate commerce. Put another way: Is the charge designed to generate a fee in excess of what will fairly compensate a state for services rendered or benefits provided? If so, the charge constitutes a burden on interstate commerce and is invalid. *Washington Dept. of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

We have seen that, where State property is a necessary facility for interstate commerce, as here, the “user” fee or rent must have a reasonable relationship to benefits conferred by the State. This is a necessary restriction evolved to deal with ownership by the State of basic interstate facilities, such as airports. It applies, *a fortiori*, in a case like the present, where the State owns the entire sweep of tidelands from Oregon to the Mexican border, a distance of well over a thousand miles. In the present case, the Court of Appeals correctly concluded that the throughput charge is not directed toward compensating the State for the use of the land and that there is no correlation between benefits conferred by the State and the charges. The land leased by the Commission is admittedly unimproved. No services

or facilities are provided by the State.⁵ Appellees must perform all operations required to make the land usable, from dredging to construction. All that the State gives is the right to traverse its land with this interstate commerce and the right to build the facilities on its land necessary for such commerce.

It is surely of great significance in this connection that, admittedly, the State first collects a reasonable rental based on its appraisal, which the pipeline owner is bound to pay in any event. Then, the State tacks on its throughput charge, which bears no relationship at all to the rental value of the land provided by the State. Rather, it reflects the State's grip, through its real property ownership, on the throat of interstate commerce.

The Court of Appeals correctly observed:

"We are of the opinion that the volumetric rates are a disguised revenue raising measure. The rates do not reflect the value to the State of its land, but the maximum amount of revenue California can extract from interstate commerce by utilizing its strategic geographic position. There is no correlation between benefits conferred by the State and the throughput charges.

⁵In this connection, both the District Court and the Court of Appeals found that the Commission leased unimproved land and provided no benefits or services in connection therewith. Both courts rejected as irrelevant the Commission's claim that its leasing practices were or should be the same as those employed by private parties or ports. The State's Jurisdictional Statement ignores these findings and continues to argue that its throughput regulations are comparable and somehow, therefore, reasonable. But, it is well established that the Supreme Court accepts as conclusive the findings in which the two courts below concur unless clear error is shown. *Continental Ill. Natl. Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 678 (1935); *Dun v. Lumbermen's Credit Assn.*, 209 U.S. 20, 23-4 (1908). No such error is shown, or even argued, by the State. The State's attempt to "back-door" the previously rejected facts contained in the record, therefore, should be rejected.

We therefore hold that the charges impose an undue burden on interstate commerce and are violative of the Commerce Clause."

Court of Appeals' opinion, Jurisdictional Statement p. A-10.

Given that there is no such correlation between benefits conferred and the throughput regulations, this Court must assume, which is the fact, that the Court of Appeals' opinion does no violence at all to the consistent body of authority in this area.

E. The Ninth Circuit's Holding Applies Only to the Commission's Throughput Regulations.

The Court of Appeals was careful to explain that its holding did not invalidate all throughput types of leases. (Jurisdictional Statement, p. A-13.) It correctly found that the throughput rental was unconstitutional under the Commerce Clause and the Import-Export Clause but that other volumetric charges would be judged on the basis of their result, not their formula (*Id.*)

Thus, the holding of the Court below will not affect charges by public ports, as the State now claims. It will serve to tell the State, however, that it cannot impose a prohibited tariff by calling it a rental.

CONCLUSION

All that this case holds is that a state may not collect a tariff by calling it a rental. That is hardly a proposition which requires the attention of this Court. For all of the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

August , 1984

Respectfully submitted,

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